Supreme Court, U.S.
FILED

03 846 DEC 15 2003

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

DOUGLAS F. DUSTIN,

Petitioner,

- vs -

ANA M. RAMIREZ-PALMER, WARDEN

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANK J. RAGEN
Counsel for Petitioner
105 West "F" Street, Suite 209
San Diego, California 92101
Telephone: (619) 231-4330

QUESTIONS PRESENTED FOR REVIEW

I.

Whether this Court should grant the petition for a writ of certiorari to determine whether the Ninth Circuit erred in finding it was not contrary to or an unreasonable application of the Court's Fifth Amendment case law to allow jailhouse psychiatrists who examined Petitioner for the purpose of determining if he was a suicide risk to opine on Petitioner's mental state for the prosecution and to testify to unwarned statements Petitioner made about the offense after invoking his rights to remain silent and to counsel?

II.

Whether this Court should grant the petition for a writ of certiorari to determine whether the Ninth Circuit erred in finding it was not contrary to or an unreasonable application of the Court Sixth Amendment case law to find Dustin's right to counsel was not violated when he was interviewed by jailhouse psychiatrists without notice to or an opportunity to consult with his attorney?

III.

Whether this Court should grant the petition for a writ of certiorari to determine whether the Ninth Circuit erred in finding Petitioner knowingly waived his right to a trial by jury when his waiver was based on an agreement the trial court would consider all evidence from prior trials and proceedings, and some of the evidence was missing?

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... v-vii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATUTES 2

STATEMENT OF THE CASE 3

A. Statement Of The Offense And Arrest 3

B. State Court Proceedings 6

C. Federal Habeas Review 14

REASONS TO GRANT THE WRIT 16

I. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED AN ISSUE OF PETITIONER'S FIFTH AMENDMENT RIGHTS IN A WAY THAT CONFLICTS WITH AND IS AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT 16

A. Nature of the Errors 16

B. The Ninth Circuit Court of Appeals' Decision Was Contrary To And An Unreasonable Application Of The Court's Fifth Amendment Decisions 17

1. The Fifth Amendment Is Implicated During Pre-trial Custodial Psychiatric Examinations And Dustin Had Invoked His Rights 17

2 The Fifth Amendment Is Not Implicated By The Purpose For Which Statements Are Taken, But By The Content Of The Statements And The Uses To Which They Are Put 19

3 It Was An Unreasonable Application Of Penry v. Johnson, 532 U.S. 782 (2001) To Find It Permitted The Jailhouse Psychiatrists And Psychologist To Testify To Statements Dustin Made About The Offense 21

4. The Court's Distinguishing Treatment Of Estelle v. Smith, 451 U.S. 454 (1981) In Penry v. Johnson, 532 U.S. 782 (2001) Reinforces The Court of Appeals' Error .. 23

II. THE COURT SHOULD GRANT THE WRIT BECAUSE THE NINTH CIRCUIT COURT OF APPEALS' DECISION SUSTAINS A DECISION THAT UNREASONABLY PERMITS THE PROSECUTOR TO CIRCUMVENT THE SIXTH AMENDMENT 24

III. THE COURT SHOULD GRANT THE WRIT BECAUSE THE NINTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING AS REASONABLE THE FINDING DUSTIN MADE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO A JURY TRIAL . 22

CONCLUSION 23

TABLE OF AUTHORITIES

SUPREME COURT CASES

Alvord v. Wainwright,
469 U.S. 956, (960 (1984) 27

Brady v. Maryland,
397 U.S. 742, 748 (1970) 27

Buchanan v. Kentucky,
483 U.S. 402, 414 (1987) 23

Early v. Packer,
537 U.S. 3 (2002) 17

Edwards v. Arizona,
451 U.S. 477, (1980) 18

Estelle v. Smith,
451 U.S. 454 (1981) 18, 19, 21-27

Johnson v. Zerbst,
304 U.S. 458, 464 (1938) 27

Miranda v. Arizona,
384 U.S. 436 (1966) 18-24

Penry v. Johnson,
532 U.S. 782, 794-95 (2001) 15, 17-18, 20-23, 25

Pennsylvania v. Muniz,
496 U.S. 582, n.13 (1990) 21-22

Powell v. Texas,,
492 U.S. 680 (1989) 26, 27

Satterwhite v. Texas,
486 U.S. 249, 292 (1988) 26, 27

United States v. Ruiz
536 U.S. 622, 630-31 (2002) 16, 28

OPINIONS

Dustin v. Ramirez-Palmer,
No. 02-56029, United States Court of Appeals for the Ninth Circuit, 2003 U.S. App. LEXIS 13246 (June 27, 2003), pet'n for reh'g and sugg. for reh'g en banc denied September 17, 2003 ..... 1, 17

Dustin v. Ramirez-Palmer,
00-cv-01441 (S.D. Cal. March 18, 2002) 15

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend V ..... 1, 4, 17-19 , 21, 23

U.S. Const. Amend VI 2, 4, 25-27

U.S. Const. Amend X1V 17

FEDERAL STATUTES

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 ..... 1, 2

FEDERAL RULES

Supreme Court Rule 10(c) 2

STATE COURT CASES

People v. Danis
(1973) 31 Cal.3d 782 7

STATE STATUTES

Cal. Penal Code § 187 6

Cal. Penal Code § 1368 10-12

Cal. Penal Code § 12022.5 6

Petitioner, Douglas F. Dustin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 27, 2003.

OPINION BELOW

On June 27, 2003, the Ninth Circuit filed an unpublished opinion affirming the district court's denial of Dustin's motion for relief under 28 U.S.C. § 2254. See Appendix.[1] A petition for rehearing and suggestion for rehearing en banc was filed. On September 17, 2003 the petition was denied.

JURISDICTION

On September 17, 2003, the Court of Appeals for the Ninth Circuit denied Dustin's petition for rehearing and suggestion for rehearing en banc following the June 27, 2003 denial of his application under 28 U.S.C. § 2254. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

---

[1] A copy of the Opinion is attached hereto in the Appendix. Dustin v. Ramirez-Palmer, No. 02-56029, United States Court of Appeals for the Ninth Circuit, 2003 U.S. App. LEXIS 13246 (June 27, 2003)

> forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES

28 U.S.C. §2254(d)

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim ---

(1) resulted in a claim that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;...

STATEMENT OF THE CASE

A. Statement Of The Offense And Arrest

On September 13, 1987 at about 7:15 p.m. Petitioner Douglas Dustin, a respected dentist with two offices in the Los Angeles area, shot and killed his estranged wife, Heidi Dustin.

Dustin had a history of clinical depression dating back to 1968. In March 1985, Douglas Dustin separated from Heidi after 24 years of marriage. In April 1985, consistent with earlier diagnoses, Dustin was again diagnosed with major depression. Following his separation from his wife, over the next two years, Dustin became increasingly agitated, depressed and obsessive. By then Heidi was romantically involved with Karl Fabritz. Karl Fabritz had been a mutual friend of the couple who had previously assisted them in training their dogs. Dustin was hospitalized for 10 days in October 1985 as a suicide risk. His guns were removed from his home. On October 4, 1986 Dustin set Fabritz's vehicle on fire in the parking lot of a restaurant where Fabritz and Heidi were dining. On May 17, 1987 Dustin drove to La Jolla, California to confront Heidi about her relationship with Fabritz. Driving at speeds of over 90 miles per hour, he lost control and crashed his automobile, in an apparent suicide attempt.

On September 3, 1987 Dustin purchased a .45 caliber handgun. Ten days later, on September 13, 1987 at about 7:15

p.m. Dustin shot and killed Heidi Dustin.

Early in the morning of September 14, 1987 Dustin, accompanied by his attorney, Patrick Murphy, surrendered to San Diego police. Murphy told police he was Dustin's attorney and was asserting Dustin's Fifth and Sixth Amendment rights. His attorney elicited a specific promise that no one would interview Dustin without his presence.

That evening Dustin was taken to a San Diego County Mental Health facility after telling jail personnel during a routine intake interview he was contemplating suicide. Psychiatrist Lee Bowlus performed mental status and psychiatric examinations to evaluate the suicide risk 'to make sure [petitioner did not] try to kill [himself] while in custody.' Bowlus determined Dustin was a suicide risk.

The next morning Dustin was evaluated by John Maloy, a psychologist and chief of Forensic Mental Health Services for San Diego County in a county jail 'safety cell,'[2] who confirmed the suicide risk determination.

On September 16, 1987 Dustin was examined by another psychiatrist, Ansar Haroun, to determine whether Dustin had a psychiatric disorder and whether he was suicidal. Within ten minutes he concluded Dustin did not have a psychiatric disorder, but was suicidal and ordered him

---

[2] Testimony indicated a "safety cell" or "G cell" is an individual room with rubberized walls and ceilings and floors so a person is safe when they are in there."

transferred to the Psychiatric Security Unit. [3]

Dustin's attorney was neither given notice of, or present for the interviews on September 14, 15 and 16, 1987. During the interviews, allegedly to determine his risk for suicide, Bowlus, Maloy and Haroun elicited incriminating statements with questions that far exceeded the scope of that evaluation, including questions about the offense. The three saw Dustin a total of 40 minutes, 10 minutes and 20 minutes, respectively. There is no evidence any of the three considered other sources of information or reports concerning Dustin's mental history or state of mind.

In an affidavit attorney Patrick Murphy declared at the time of Dustin's self surrender he advised arresting San Diego Police officers as follows:

> I was Dr. Dustin's lawyer and that I would be his lawyer for all purposes. On Dr. Dustin's behalf, as his counsel, in his presence and with his consent, I advised San Diego Police officers that Dr. Dustin was invoking his right to remain silent and to counsel. I elicited from San Diego police officers a specific promise that no one would interview my client, Dr. Dustin, unless it was in my presence as his attorney; and I did not receive notice of the

---

[3] Over the course of the following proceedings, Dustin spent seven years confined in the Psychiatric Security Unit of the San Diego County jail, the longest residence there of any inmate in the history of the jail. Jail psychiatrists Lloyd Droske and Benjamin Bensoul diagnosed Dustin as suffering from major depression with psychotic features.

questioning of my client, Dr. Douglas Dustin, by jail psychiatrist and psychologist on September 14, 15, and 16, 1987. I was not present during questioning of my client, Dr. Dustin, by jail psychiatrist and psychologist following his arrest on September 14, 1987.

B. State Court Proceedings

On November 25, 1987 the District Attorney of San Diego filed an information charging Dustin with murder in violation of California Penal Code § 187, committed by personal use of a firearm within the meaning of California Penal code § 12022.5. Dustin pled not guilty on December 14, 1987. On January 27, 1988 Dustin withdrew his plea of not guilty and entered a plea of not guilty by reason of insanity.

Proceedings in Dustin's case were suspended three times due to doubts about Dustin's competence.

On February 14, 1989, the guilt phase of Dustin's first trial commenced. On February 21, 1989 the Court declared a doubt as to Dustin's mental competency to stand trial. The jury trial proceeded on February 23, 1989 after Dustin was declared competent to stand trial. His counsel moved to exclude the testimony of the jail house doctors.

During the guilt phase two psychiatrists and a psychologist appointed by the Superior Court to evaluate Dustin's sanity at the time of the offense testified. Two more psychiatrists and one psychologist hired by the defense to conduct similar evaluations also testified. All six

independently found that Dustin was suffering from psychotic major depression and was legally insane at the time of the offense. Specifically, Meredith Friedman, a clinical psychologist who met with Dustin at the San Diego County Jail in the fall of 1987 testified Dustin suffered from psychotic depression. Martin Blinder, a psychiatrist who examined Dustin in the fall of 1987 testified in September and October 1987 Dustin suffered from a major depressive disorder, complicated by alcohol abuse and a probable dissociative episode layered on obsessive-compulsive personality. Richard Rappaport, who first examined Dustin on September 29, 1987 testified that on the day of Heidi's death Dustin was experiencing an ongoing depression and an acute psychotic break with a dissociative reaction. Psychiatrist Dean Archer, M.D., Sanford Wolf, M.D. and psychologist Thomas MacSpeidin, all appointed by the Superior Court to conduct medical examinations to determine whether Dustin was sane or insane at the time of the offense, each independently found that Dustin was suffering from major psychotic depression and was legally insane at the time of the shooting. Archer and Wolf testified at the guilt phase of the proceedings. MacSpeiden testified in the sanity phase of proceedings.

Pursuant to the dictates of People v. Danis (1973) 31 Cal.3d 782, 786-787,[4] prior to trial the prosecution selected Dr. David Braff, M.D., to examine petitioner. Dr. Braff conducted a detailed and thorough examination of Dustin prior to trial. He also reviewed reports produced by Dustin's experts, transcripts of testimony and statements from Dustin's

---

[4] "[A] trial court possesses the inherent power to order a defendant who has imposed a defense of insanity or of diminished [actuality] to submit to an examination of a psychiatrist selected by the People." (Id. at p. 786)

sons. The prosecution chose, however, not to use Dr. Braff during its guilt phase.[5]

Dustin did not testify. However, in rebuttal the prosecution called the three jailhouse psychiatric professionals (Bowlus, Maloy and Haroun) who each testified Dustin was sane at the time of the murder. In addition to opining on Dustin's mental state at the time of the murder, the men testified to statements Dustin made about the offense. For instance, Bowlus testified Dustin stated 'he killed his wife,' and he had been planning to kill her because she had been having an affair for about two years prior to her death and he was very jealous and upset about it. He also testified Dustin told him he had planned to kill himself but did not for the following reasons:

> What he told me was that he came down to La Jolla, and he and his wife had a big fight, and this culminated in him shooting her, and he ended up — from what he said, he shot her in the street, and there was a big commotion; and at that point, he got in his car and drove away, and he drove home, and on the way home he said he was thinking he was just going to go home to Pasadena and kill himself with his gun; and when he got home, his son was home,

---

[5] Perhaps because the prosecution recognized Dr. Braff was not a strong witness for the state. During direct testimony in the sanity phase, Dr. Braff testified he found Dustin depressed, yet not psychotic, and he found "no solid evidence that [Dustin] was psychotic." However during cross-examination, in confusing testimony, he equivocated: "So in general I think he was psychotic, although I would separate psychosis as poor reality testing from psychotic symptoms of hallucinations and delusions. So really trying to answer the questions of hallucinations and delusions apart from gross impairment, he was grossly very impaired."

> and his son realized that his father was quite upset and talked him out of it, and that's what prevented him from killing himself."

Meloy testified Dustin stated his 'desire to kill wife's boyfriend,' and '[Dustin] killed his wife because she was an adulterer but now regrets it because he killed the one he loved.'

On March 17, 1989 the jury found Dustin guilty of murder in the first degree and found it true that he had personally used a firearm. On March 20, 1989 the sanity phase commenced. On May 24, 1989 a mistrial was declared after the jury was unable to reach a jury verdict. On May 24, 1989 the court ordered an examination pursuant to California Penal Code § 1368 to determine whether Dustin was mentally competent to stand trial.

More than three years later, the sanity phase of Dustin's trial proceedings resumed. On September 14, 1992, Dustin moved to exclude the testimony of the jailhouse doctors as to their opinions regarding Dustin's mental state at the time of the offense and Dustin's statements during the interviews that led to those opinions. The motion was denied. On September 16, 1992 the second sanity phase of the proceedings commenced. The same five experts who testified for the defense in the guilt phase and Dr. MacSpeiden testified for Dustin in the sanity phase. The People presented testimony from Dr. Braff and Bowlus, Meloy and Haroun, the latter three testifying Dustin was not psychotic when they examined him shortly after his arrest. On October 16, 1992 a mistrial was declared after the jury was unable to reach a verdict.

On March 26, 1993 Dustin's motion for a mistrial after the guilt phase of the trial was denied. Dustin filed a Petition for Writ of Mandate to the California Court of Appeal, Fourth Appellate District, Division One in Case No. 018799, which was granted on November 22, 1993 resulting in entry of a mistrial as to the guilt phase of trial.

On April 25, 1994, criminal proceedings were suspended pursuant to California Penal Code § 1368. On July 20, 1994 Judge Terry Knoepp ruled Dustin was mentally incompetent to stand trial and committed Dustin to Patton State Hospital.[6] During his stay at Patton State Hospital Dustin's diagnosis of major depression with psychotic symptoms was confirmed by his treating physicians, who prescribed Nardil. Nardil is used only as a last resort treatment because it is a potentially toxic medication that interacts with common foods and other medications in potentially fatal ways. With this medication, Dustin finally obtained some relief from the psychotic delusions, and was found competent on August 23, 1995. On October 5, 1995 he was discharged from Patton State Hospital and returned to court for further proceedings.

The San Diego County Sheriff's Office ignored specific instructions from Patton and the court's competency examiner.[7] Dustin was housed in a county jail, instead of the

---

[6] It should be noted the entire proceedings of this competency determination are missing from the transcripts.

[7] Patton State Hospital's Medical Director, Ronald Hattis issued an opinion "Dr. Dustin is presently competent to stand trial. ... [Dustin] will need continued treatment in a hospital or treatment facility in order to maintain competence to stand trial or

community mental health facility doctors had said was necessary in order to maintain his competency. Dustin informed his trial counsel he was not receiving the medical diet required to avoid potentially fatal combinations with the Nardil, he was unable to tolerate the physical and emotional stress caused by jail custody, and the commute for court proceedings was beyond his capacity to endure. On October 11, 1995 Judge Joan Weber ordered a Penal Code § 1368 (competency) trial be continued to October 17, 1995. On October 17, 1995 Judge Revak did not conduct a competency hearing. Instead, he secured Dustin's waiver to his right to trial by jury and the right to be present at trial. Dustin also agreed the trial would be based on the transcripts of the two prior jury trials. This waiver was secured after his counsel advised him if he waived jury trial and consented to a bench trial the judge would return him to Patton State Hospital while the trial was conducted in his absence. However, if but if he opted for trial by jury he would remain at the county jail and forego psychiatric treatment during the entire period of the trial.

---

that placing the person in a jail environment would create a substantial risk that the person would again become incompetent to stand trial before criminal proceedings could be resumed." The Superior Court's appointed examiner also found Dustin competent, but stated "[D]uring any subsequent trial, it would be necessary to house Dustin in a private facility such as Harbor Hospital or another appropriate facility in order to appropriately treat him since staff at the PSU would not be equipped to do so based on his dietary and medication needs... It is also likely to be helpful that psychotherapeutic services on an individual basis be available to the patient during subsequent legal proceedings. As stated above, he will require inpatient psychiatric services in the community."

On October 17, 1995, the petitioner's next appearance in court, Judge Revak did not conduct a Cal. Penal Code §1368 hearing or receive any input from any experts regarding petitioner's mental state. The examination of petitioner was slight. 'How are you feeling this morning?" . . . "Do you understand . . . "' On that date the petitioner waived his right to a trial by jury and the right to be present at the trial. Before securing Dustin's waiver Judge Revak advised him of his right to a jury trial and stated:

> Your attorney has indicated that it is his desire and your desire to waive your right to a jury trial and to submit the matter based on all the testimony that has been transcribed and reported prior to proceedings in front of Judge Meloche and in front of me; however, preserving your right to make objections, that is, your right to make objections to questions in answers, the District Attorney's right to make objections to questions and answers. Do you understand that?" . . . "Do you understand that it is anticipated that there will be no additional testimony, that is live testimony in this proceeding?" . . . "In other words my decision will be based only on the allowable evidence from the prior proceedings, trials.

Petitioner agreed to waive his right to a jury trial and all the associated rights based on the agreement Judge Revak would make a decision based on all the testimony from the two prior trials and all the allowable evidence from prior proceedings.

The trial court convicted Dustin at a bench trial and

found he was sane at the time of the murder.

Following Dustin's conviction he appealed. On April 19, 1999 the California Court of Appeal denied his appeal in which he argued the admission into evidence of the testimony of the jail psychologist and two jail psychiatrists violated Dustin's Fifth and Sixth Amendment rights.

A Petition for Review by the California Supreme Court was denied on July 21, 1999.

After the matter was submitted to Judge Revak and after the appeal, it was discovered that substantial portions of the reporter's transcripts constituting testimony heard by Judge Meloche in both the guilt and sanity phase which Judge Revak would not have previously heard are missing from the record. The Court Reporter's Certification indicating that the transcripts had been lost, destroyed or not transcribed from notes appear as exhibits in and attached to the original Petition for Writ of Habeas Corpus.

These missing transcripts concern the following aspects of the case:

(1) A bench conference concerning the testimony of Richard Rappaport, M.D., a psychiatric expert retained by defense counsel to conduct a psychiatric evaluation of the Petitioner.

(2) Portions of the testimony and a bench conference concerning the testimony of Dean Archer, M.D., a psychiatrist expert selected and appointed by the Superior Court to examine the Petitioner for the purpose of determining the Petitioner's sanity at the time of the offense.

(3) Portions of the testimony and bench conferences concerning the testimony of David Braff, M.D., a psychiatric expert retained by the District Attorney's Office to conduct a psychiatric evaluation of the Petitioner regarding the Petitioner's sanity at the time of the shooting

(4) A portion of the testimony of Marvin Warman, M.F.C.C., a marriage, family and child counselor and a pastor, who provided the Petitioner with pastoral counseling in the nine months leading up to the shooting.

(5) Bench conferences and all of the bench testimony of Pastor Warman concerning the admission of audio cassette tapes into evidence.

(6) Transcriptions of the tapes mentioned in paragraph 5 above, which tapes were played to the jury but never entered into evidence, and so were unavailable for review by Judge Revak or the appellate attorneys. A review of the transcripts of the tapes of the counseling sessions with Marvin Warman are particularly important in that they show the Petitioner's mental state from May 1987 up to the week prior to the homicide.

C. Federal Habeas Review

On July 20, 2000 Dustin filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of California in Dustin v. Ramirez-Palmer, 00-cv-01441. The district court had jurisdiction under 28 U.S.C. § 2254. On August 1, 2000, the Magistrate Judge

ordered a response. September 26, 2000, the Answer to Petition for Writ of Habeas Corpus was filed. On October 30, 2000, the Traverse by Petitioner was filed along with a Memorandum. On February 5, 2001 Magistrate Judge Robert T. Benitez. filed a Report and Recommendation for Denial of Petition for Writ of Habeas Corpus. See Appendix. On March 2, 2001, Dustin filed Objections to the Report and Recommendation. On March 18, 2002, an Order was entered by Judge M. J. Lorenz overruling the Petitioner's Objections to the Report and Recommendation and adopting in its entirety the Report and Recommendation. The Order denied the Petition for Writ of Habeas Corpus. See Appendix. On April 16, 2002 a Notice of Appeal was entered. On April 18, the Application for Certificate of Appealability was filed. On June 7, 2002, the Court granted Petitioner's Application for Certificate of Appealability as to all five claims presented in the Petition On June 27, 2003 the Ninth Circuit affirmed the district court's denial of Dustin's Petition for Writ of Habeas Corpus. Dustin v. Ramirez-Palmer, 2003 U.S. LEXIS 13246 (June 27, 2003). In pertinent part the court stated:

> The state appellate court determined that the jailhouse interviews by the two psychiatrists and the psychologist were conducted in response to Dustin's suicide threats and not to provide law enforcement with incriminating information. Given that Dustin places his mental state in issue at trial, it was not an unreasonable application of clearly established federal law to allow the State to use these interviews to rebut Dustin's sanity defense. *See, e.g. Penry v. Johnson, 532 U.S. 782, 794-95, 150 L. Ed. 2d 9, 121 S. Ct. 1910 (2001).*

Id. at * 3. The Ninth Circuit Court of Appeals further stated:

> Dustin also contends that, because portions of the record were missing when the court conducted the bench trial, his waiver of a jury trial was invalid. We disagree. The missing portions of the record were inconsequential. Dustin received the bench trial to which he was entitled and which he sought by his jury trial waiver. He may have misapprehended how the bench trial would be conducted, but a court is permitted to accept waivers of "various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *United States v. Ruiz*, 536 U.S. 622, 630-31 (2002)(collecting cases).

On September 17, 2003. In relevant part the Dustin's Petition for Rehearing and Suggestion for Rehearing En Banc was denied. This Petition for Certiorari follows.

REASONS TO GRANT THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED AN ISSUE OF PETITIONER'S FIFTH AMENDMENT RIGHTS IN A WAY THAT CONFLICTS WITH AND IS AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT

A. Nature of the Errors

Under Supreme Court Rule 10 a petition for writ of certiorari will be granted for compelling reasons, including where a state court or a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Ninth Circuit Court of Appeals affirmed the denial of Dustin's habeas petition on Fifth Amendment grounds. Specifically it upheld the district court's finding that admission of the jailhouse psychiatrists' and psychologist's testimony was not a decision that was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.' Dustin v. Ramirez-Palmer, 2003 U.S. App. LEXIS 13246 (June 27, 2003); see 28 U.S.C. § 2254 (d); Early v. Packer, 537 U.S. 3 (2002) (per curiam). However, in reaching its decision the Ninth Circuit upheld the state and district courts' unreasonable application of Penry v.

Johnson, 532 U.S. 782 (2001). The Ninth Circuit Court of Appeals also upheld a decision that conflicts with and is an unreasonable of the Court's Fifth Amendment decisions in Miranda v. Arizona, 384 U.S. 436 (1966), Edwards v. Arizona, 451 U.S. 477, (1980), Estelle v. Smith, 451 U.S. 454 (1981) and their progeny.

B. The Ninth Circuit Court of Appeals Decision Was Contrary To And An Unreasonable Application Of TheCourt's Fifth Amendment Decisions

1. The Fifth Amendment Is Implicated During Pre-trial Custodial Psychiatric Examinations And Dustin Had Invoked His Rights

In Miranda v. Arizona, 384 U.S. 436 (1966) this Court determined the Fifth and Fourteenth Amendments of the United States prohibition against compelled self-incrimination requires that custodial interrogations be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of counsel.

In Edwards v. Arizona, 451 U.S. 477, 484-85 (1980) the Supreme Court held that an accused person in custody who has 'expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' Id.

The Ninth Circuit Court of Appeals never addressed

Edwards, or considered the significance of the fact Dustin invoked his rights. Neither does the opinion address the significance of the fact Dustin had invoked his right to counsel, as well as his right to remain silent. Clearly if Dustin had had an opportunity to consult with counsel he could have either refused to answer the jailhouse psychiatrists questions, or at least limited the use only to determine Dustin's suicide risk.

In Estelle v. Smith,451 U.S. 454, 465 (1981) the Court held a defendant's answers to questions during a pretrial psychiatric exam ordered by the Court, including answers to questions about the crime with which he was charged, were testimonial and entitled to the protection of the Fifth Amendment. The Court reasoned 'the fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment.' The Supreme Court held 'the Fifth Amendment privilege ... is directly involved here because the State used as evidence against [the defendant] the substance of his disclosures during the pretrial psychiatric examination.' Id. at 464-65 (emphasis added.). The Court further stated:

> When [at trial the psychiatrist] went beyond simply reporting to the court on the issue of competence and testified for the prosecution ... his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting.

Id. These decisions, none of which were addressed by the Ninth Circuit Court of Appeals, should have been the

framework of the decision. Clearly if Dustin had made statements about the offense or about his mental state to a police officer while in custody, there would have been no question the statements were inadmissible unless Dustin testified. There is no reason the statements should have become admissible under these circumstances because of the fortuity they were made to doctors during a custodial interview.

2. The Fifth Amendment Is Not Implicated By The Purpose For Which Statements Are Taken, But By The Content Of The Statements And The Uses To Which They Are Put.

The Ninth Circuit Court of Appeals decided it was permissible for the state court to permit the jailhouse doctor's testimony because the interviews were not conducted for the purpose of providing law enforcement with incriminating information but to evaluate Dustin's suicide risk. It relied solely on Penry, 532 U.S. 782 to reach this conclusion. This is an unreasonable application of and contrary to federal law as stated by the Court in Penry. The Fifth Amendment analysis does not turn on the purpose of the interview, but, rather, whether the information obtained from the interview relates to the charged offense, and is used to assist the prosecution.

In Penry the defendant who had been found guilty in a 1980 capital murder trial was facing a capital sentencing. A psychiatric report had previously been prepared by a Dr. Peebles at the request of defendant's former counsel to determine the defendant's competency to stand trial in an unrelated 1977 rape case. Id. at 794. During the penalty

phase of Penry's 1980 capital murder trial his counsel put on an expert who testified to Penry's future dangerousness, and on cross-examination the expert admitted he had reviewed the 1997 psychiatric report while preparing his testimony. Over Penry's objection, the expert then read portions of the 1997 report that strongly supported a finding of future dangerousness.

It was crucial to the Court's decision in Penry 'that when Dr. Peebles interviewed Penry, Peebles was not acting as an agent for the State in order to gather evidence that might be used against Penry.' 532 U.S. 782 at 793. In Penry the psychiatric evaluation took place before the offense. The court reasoned that at the interview two years before the murder, Penry had not been 'confronted with someone who was essentially an agent for the State whose function was to gather evidence that might be used against him in connection with the crime for which he was incarcerated.' Id. at 791 (emphasis added).

In its analysis of 'an agent for the State' the Court distinguished Estelle. In Estelle, the psychiatric exam had been ordered by the court to determine Estelle's competence. However, as the Court held:

> When [at trial the psychiatrist] went beyond simply reporting to the court on the issue of competence and testified for the prosecution ... his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting.

Id. at 464-65; See, also, Pennsylvania v. Muniz, 496 U.S.

582, n.13 (1990). (Although an arresting officer may not have had an investigatory interest in asking a DUI suspect to state the date of his sixth birthday the question was reasonably likely to elicit an incriminating response and the response was testimonial).

The Ninth Circuit Court of Appeals erred because it was not the intention of the jailhouse doctors' or the purpose of the interviews that should have determined the admissibility of the unwarned, uncounseled statements. Rather, the relevant inquiry is whether the unwarned s statements were related to the offense and later used by the prosecutor against the defendant in connection with the offense.

3. It Was An Unreasonable Application Of Penry v. Johnson 532 U.S. 782 (2001) To Find It Permitted The Jailhouse Psychiatrists And Psychologist To Testify To Statements Dustin Made About The Offense

The Ninth Circuit unreasonably applied Penry to a case where the jailhouse psychiatrists and psychologist did not limit their testimony to opining on Dustin's mental state, but also testified to incriminating statements made by Dustin about the offense for which he was incarcerated.

The Court did not address the significance of testimony regarding incriminating statements about the offense in Penry because when Penry was interviewed in 1977, he had not committed, and therefore could not make incriminating statements about, the 1980 offense. However, the issue was addressed in Estelle, 451 U.S. at 464 and n. 9

and Buchanan v. Kentucky, 483 U.S. 492, 414 (1987)

In Estelle, as here, the psychiatric testimony included a detailed recitation of incriminating statements made by the defendant. Accordingly, the Court concluded 'the Fifth Amendment privilege ... is directly involved here because the State used as evidence against the defendant the substance of his disclosures during the pretrial psychiatric examination.' Id. At 464-465 (Emphasis added.).in Estelle the statements were protected by the Fifth Amendment. 451 U.S. at 464 and n.9.

By contrast, in Buchanan v. Kentucky, 483 U.S. 402, 414 (1987) the Court upheld a trial court decision to admit psychiatric testimony to rebut the defendant's defense of extreme emotional disturbance. Id. at 423. However, evidence was limited to portions in a report 'in which the psychiatrist had set forth his general observations about the mental state of petitioner, but had not described any statements by petitioner dealing with the crimes for which he was charged.' Id.

It was significant to the Court in Penry, and the Ninth Circuit Court of Appeals decision in this case, that the defendant placed his mental condition at issue. However, assuming, *arguendo,* that once Dustin placed his mental state at issue some psychiatric evidence from the jail house interviews might have been proper, under Estelle and Buchanan that evidence should have been limited to testimony that did not include recitation of incriminating statements by Dustin about the offense or opinions that assumed the truthfulness of those statements.

Further, the decision in Buchanan was supported by

the rationale that where the defendant has placed his mental status at issue and does not take the stand, it is not fair for the defendant to deny the government access to other psychological evidence to rebut his defense. Here, however, that was not the case. Pursuant to a court order, and with the advice of counsel, Dustin submitted to psychiatric evaluations for the express purpose of determining his sanity. The Court appointed two psychiatrists and one psychologist (all of whom concluded Dustin was suffering from psychotic major depression and was legally insane at the time of the offense). Dustin also submitted to an evaluation by a psychiatrist retained by the prosecution, who it decided not to call at the guilt phase of the trial, and at the sanity phase equivocated in his testimony, finding Dustin was suffering from psychotic major depression and was grossly impaired, though not to the point of insanity at the time of the shooting. The government was also able to cross-examine the two psychiatrists and one psychologist who testified for the defense.

Clearly in the absence of the jailhouse doctors' interviews and testimony the prosecutor would not have been denied access to Dustin's mental state. Six experts (three neutral appointees of the court and three defense experts) testified to Dustin's mental state. The prosecutor should not have been permitted to rely on psychiatric testimony based on Dustin's uncounseled, unwarned statements after he had invoked his Miranda rights in an interview conducted without notice to his counsel that the interview was being conducted, or of the scope of that interview.

///

///

4. The Court's Distinguishing Treatment Of Estelle v. Smith 451 U.S. 454 (1981) In Penry v. Johnson, 532 U.S. 782 (2001) Reinforces The Court of Appeals' Error

In deciding Penry, the Court pointed to several factors distinguishing the case from Estelle v. Smith. 532 U.S. at 794. It noted that in Penry defense counsel had requested the psychiatric interview. Penry, 532 U.S. at 794. By contrast, in Estelle, it was the court that had called for the examination. Similarly, here, Dustin did not seek the jailhouse interviews, and, in fact specifically objected to them in advance. In Penry, the objectionable testimony only resulted when the prosecutor cross-examined Penry's own expert. By contrast here, as in Estelle, the disputed testimony was introduced by the prosecution, and was not related to Dustin's presentation. In Penry, the defense requested the examination at issue. Id. Here, as in Estelle, the examination was conducted without notice to or with the benefit of the advice of counsel. In Penry, the offense had not yet been committed at the time of the offense, id. , while in Estelle, as here, the defendant had already committed the offense and the issues of his interrogation were already clear. The many ways in which this case is similar to Estelle and dissimilar to Penry is evidence the Court of Appeal upheld an unreasonable application of thedecisions.

II.
THE COURT SHOULD GRANT THE WRIT BECAUSE THE NINTH CIRCUIT COURT OF APPEALS DECISION SUSTAINS A DECISION THAT UNREASONABLY PERMITS THE PROSECUTOR TO CIRCUMVENT THE SIXTH AMENDMENT

The Court has emphasized the importance of the

Sixth Amendment right to counsel in deciding whether to submit to psychiatric examinations and in determining their scope. For instance, in Estelle, the Court found a Sixth Amendment violation because 'respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.' 451 U.S. at 471. Further, as the Court stated in Powell v. Texas, 492 U.S. 680 (1989):

> While it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, it certainly is not unfair to required the state to provide counsel with notice before the examining the defendant concerning future dangerousness. Thus if a defendant were to surprise the prosecution on the eve of trial by raising an insanity defense to be supported by psychiatric testimony, the court might be justified in ordering a continuance and directing that the defendant submit to examination by a state-appointed psychiatrist. There would be no justification, however, for also directing that defense counsel receive no notice of this examination.

Id. ; see also, Satterwhite v. Texas, 486 U.S. 249, 292 (1988) (requiring advance notice to defense counsel of psychiatric examination); Buchanan, 483 U.S. at 424 (finding no Sixth Amendment violation where "petitioner's counsel himself requested the psychiatric evaluation by Doctor Lange. It can be assumed ... that defense counsel consulted with petitioner about the nature of this

examination)

Here, while Dustin had not been arraigned, he had been booked into the jail on serious charges and had already invoked his right to counsel. Under Estelle, Powell, Satterwhite and Buchanan the decision to submit to a psychiatric evaluation is recognized as a critical stage of the proceedings to which the right to counsel attaches. Here the prosecution should not have been permitted to circumvent Dustin's Sixth Amendment right by introducing evidence from psychiatric evaluations of which his counsel had no notice were taking place, or what there scope would be, when they had access to evidence to rebut his defense from seven psychiatric evaluations that were conducted in accordance with the right to counsel.

III.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE NINTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING AS REASONABLE THE FINDING DUSTIN MADE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO A JURY TRIAL

In order to be valid, a jury waiver must be knowingly and voluntarily made. Brady v. Marvland, 397 U.S. 742, 748 (1970) ('Waiver of constitutional rights [including the right to a jury trial] must not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'). See also, Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Alvord v. Wainwright, 469 U.S. 956, (960 (1984).

In this case The Ninth Circuit Court of Appeals

concluded Dustin's waiver of his jury trial rights was valid because the missing portions of the record were 'inconsequential. However, two juries with the benefit of all the evidence had already hung on the issue of sanity. The Court of Appeals also held Dustin's waiver was valid because he may have 'misapprehended' how the bench trial would be conducted. It relied upon United States v. Ruiz, 536 U.S. 622, 630-31 (2002). However, Ruiz did not involve a case where a waiver was based upon an agreed upon set of facts, and then the facts were changed. When Dustin waived his jury trial rights he did not 'misapprehend' anything. The agreement was clear: the Judge was to consider all transcripts and evidence from prior proceedings. Because this was not the case, Dustin's waiver was not knowing as a matter of law.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Frank J Ragen

FRANK J. RAGEN
Attorney for Petitioner
105 West 'F' Street, Suite 209
San Diego, CA 92101
(619) 231-4330